No. 82-1633

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HOSPITAL BUILDING COMPANY,
Petitioner,

v.

TRUSTEES OF REX HOSPITAL, a Corporation; JOSEPH BARNES; and RICHARD URQUHART, JR.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

RAY S. BOLZE
(Counsel of Record)
MARK W. PENNAK
RONALD K. PERKOWSKI
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

THOMAS W. STEED, JR.
NOAH H. HUFFSTETLER, III
DEAN M. HARRIS
MOORE, VAN ALLEN & ALLEN
Post Office Box 2058
Raleigh, North Carolina 27602
(919) 828-4481

Counsel for Defendants-Respondents Trustees of Rex Hospital, et al.

Dated: May 6, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Fourth Circuit properly remanded the case for a new trial so as to accord defendants an opportunity to present evidence showing that their health-care planning activities fell within the "scope and purposes" of then-applicable federal health-care planning legislation and were therefore justified under the rule of *Silver v. New York Stock Exchange*, 373 U.S. 341, 360-61 (1963), as applied to "the health-care industry" by this Court in *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U.S. 378, 392-93 n.18 (1981).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES: Page

FEDERAL STATUTES:

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1633

HOSPITAL BUILDING COMPANY,
Petitioner,
v.
TRUSTEES OF REX HOSPITAL, a Corporation; JOSEPH BARNES; and RICHARD URQUHART, JR.,
Respondents.[1]

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In its Petition, plaintiff, Hospital Building Company ("HBC"), commits numerous factual misstatements as well as entirely omitting many of the relevant facts. In reversing and remanding for a new trial, the Fourth Circuit simply gave defendants the opportunity to introduce evidence showing that their actions were part of local health planning efforts funded and encouraged by the then-applicable federal health-care planning legislation cited by the Fourth Circuit. In so holding, the court below faithfully adhered to *Silver v. New York Stock Exchange*, 373 U.S. 341, 360-61 (1963), as most recently construed in *National Gerimedical Hospital & Gerontology*

[1] All parties to this action are listed in the caption. Trustees of Rex Hospital has no affiliates, subsidiaries or parent companies.

Center v. Blue Cross, 452 U.S. 378, 393 n.18 (1981). As the Fourth Circuit held, whether defendants are, in fact, entitled to such an implied immunity necessarily requires a retrial because the trial court denied defendants the opportunity to introduce evidence concerning the nature and extent of their conduct.

This Court should deny plaintiff's Petition for Certiorari on this implied immunity issue not only because the Fourth Circuit correctly applied the legal principles settled in *Silver* and *National Gerimedical*, but also because the Fourth Circuit's implied immunity ruling is an interlocutory holding on a non-dispositive [2] issue concerning conduct occurring in 1969-1971 under federal health-care planning legislation since replaced by the National Health Planning and Resources Development Act of 1974, 88 Stat. 2225 (1974) ("1974 Planning Act"). This ruling simply does not present "special and important reasons" for review required by Rule 17.1 of this Court's Rules. However, if the Court should grant plaintiff's Petition, the Court should also grant review of the additional issues raised by defendants in their Rule 19.5 conditional cross-petition for certiorari. *Trustees of Rex Hospital, et al. v. Hospital Building Company*, Dkt. No. 82-1762 (filed April 28, 1983).

I. THE FACTS

Defendant Rex Hospital is a non-profit North Carolina corporation established in 1840. (D-441.)[3] At the times relevant here, defendant Joseph Barnes was the Chief

---

[2] The Fourth Circuit also reversed and remanded for a new trial because (1) of erroneous *Noerr-Pennington* jury instructions, and (2) because the jury was erroneously permitted to consider the State Attorney General's Office as a co-conspirator.

[3] As used in this Brief in Opposition, record citations are to particular exhibits, cited by exhibit number (*e.g.*, "D-441"); to transcript pages of the record, cited as "Tr. ——"; and to volume and pages of the Fourth Circuit Joint Appendix, cited as "App. ——."

Executive Officer of Rex Hospital (Tr. 3813), and defendant Richard Urquhart, Jr., was Vice Chairman of the Board of Trustees. (Tr. 2073-74.) The purported "co-conspirators" of defendants include the federally sponsored and funded Health Planning Council of Central North Carolina ("Health Planning Council" or "Council"); Wake Memorial Hospital System, Inc.. ("Wake"), a public hospital owned by Wake County; the Attorney General and Assistant Attorney General of North Carolina; Blue Cross/Blue Shield Association of North Carolina ("Blue Cross"); and the Joint Long-Range Hospital Planning Committee of Wake County ("Planning Committee").

Plaintiff contends that these alleged "co-conspirators" combined with defendants in a *per se* illegal "market allocation scheme," formulated in 1969-1971 through a community-level health planning effort. Thereafter, defendants expressed views to the North Carolina Medical Care Commission in opposition to plaintiff's application for a "certificate of need" to build a new hospital in Raleigh, sought a rehearing when the certificate was initially granted, and appealed an adverse decision to the courts. Plaintiff alleges that all these activities were pursuant to the original health planning effort or "market allocation scheme" and were, therefore, a "sham."

A. The Pre-1974 Health-Care Planning Legislation Cited By The Fourth Circuit

Plaintiff alleges that defendants' health planning activities constitute *per se* illegal violations of the Sherman Act. Plaintiff virtually ignores the comprehensive framework of pre-1974 federal health-care planning legislation, cited by the Fourth Circuit, which funded and encouraged the very planning activities plaintiff would condemn as *per se* illegal. By remanding for a new trial, the Fourth Circuit reconciled this legislation with the antitrust laws by according defendants an opportunity to

show that their activities, in fact, fell within the "scope and purposes" of this legislation.

Congress first became concerned with health-care planning with the enactment of the 1964 Amendments[4] to the Hill-Burton Act, 60 Stat. 1049 (1946). These 1964 Amendments provided funding for "50 percent of the costs of comprehensive regional, metropolitan area, or other local area plans for coordination of existing and planned health and related facilities."[5] Defendants' alleged "co-conspirator," the Health Planning Council, was organized in 1964 pursuant to these 1964 Amendments and received immediate approval from the North Carolina Medical Care Commission ("MCC")[6] in accordance "with the official policy of the [MCC] which supports voluntary areawide planning councils for coordinating planning of health facilities. . . ." (App. IX 3646.)

Two years later Congress enacted the Comprehensive Health Planning and Public Health Services Amendments of 1966, 80 Stat. 1180 (1966), a statute cited and quoted by the Fourth Circuit, to provide federal grants to states which had submitted comprehensive health plans. Such state plans were to

> provide for *encouraging cooperative efforts* among governmental or *nongovernmental* agencies, organizations and groups concerned with health services, facilities, or manpower, and *for cooperative efforts between such agencies, organizations and groups* and

---

[4] Hospital and Medical Care Facilities Amendments of 1964, 78 Stat. 447 (1964).

[5] S. Rep. No. 1274, 88th Cong., 2d Sess. 5 (1964).

[6] The MCC was the official state agency charged with administering federal Hill-Burton funds and licensing of hospitals. (App. II 509-10.) See N.C. Gen. Stat. §§ 131-117 *et seq.* (1972), *repealed*, 1973 N.C. Sess. Laws ch. 476, § 152.

> similar agencies, organizations, and groups in the fields of education, welfare, and rehabilitation.[7]

These Amendments were intended "to assist in financing comprehensive health planning that would identify public health needs and establish priorities for health services. . . ." [8] The 1966 Amendments also provided 75-percent federal funding to local health planning councils (such as the "co-conspirator" Health Planning Council) for the purpose of "developing . . . comprehensive regional, metropolitan area, or other local area plans *for coordination of existing and planned health services, including the facilities and persons required for provision of such services.* . . ." [9] Pursuant to this legislation, alleged co-conspirator, Health Planning Council, was designated as the official areawide health planning council for Wake, Durham, Orange, Chatham and Person Counties and received federal funding. (App. II 522-23, 700-01.)

The Fourth Circuit also relied on the 1967 Amendments to the 1966 Act.[10] These Amendments provided that state comprehensive health plans administered by state agencies and applied by local health planning councils, such as the Health Planning Council, must

> provide for assisting *each health care facility* in the State to develop a program for capital expenditures for replacement, modernization . . . which will meet

---

[7] Section 314(a)(2)(D) of the Public Health Service Act, as amended, *codified at* 42 U.S.C. § 246(a)(2)(D) (1976) (emphasis supplied).

[8] H. Rep. No. 2271, 89th Cong., 2d Sess. 2 (1966). North Carolina fully participated in the administrative framework created by the 1966 Amendments. (App. V 2055-56.)

[9] Section 314(b)(1)(A) of the Public Health Service Act, as amended, *codified at* 42 U.S.C. § 246(b)(1)(A) (1976) (emphasis supplied).

[10] Partnership for Health Amendments of 1967, 81 Stat. 533 (1967).

> the needs of the State for health care facilities, equipment and services *without duplication and otherwise in the most efficient and economical manner*. . . .[11]

These Amendments were "designed to aid health-care facilities in providing for more orderly planning so as to aid them in *eliminating duplications and overlaps* between the services which they provide and the services provided by other facilities serving the same general area." [12]

The Fourth Circuit also cited 1970 federal legislation through which Congress further strengthened the responsibilities of areawide health planning councils. The 1970 Amendments, 84 Stat. 1297 (1970), to the Heart Disease, Cancer, and Stroke Amendments of 1965, 79 Stat. 926 (1965), for example, conditioned the award of federal funds on a showing that the grant application had been considered by a local planning council so as "to insure greater coordination of health planning and programming efforts at the local level and adherence to community established priorities." [13] Similarly, the Medical Facilities Construction and Modernization Amendments of 1970, 84 Stat. 336 (1970), conditioned federal approval of projects on a showing that a local health planning council had had an opportunity to make recommendations on the project. Such requirement was intended "to further improve the coordination required as a part of comprehensive health planning on the State and community level" and to "encourage the development of a coordinated and interrelated community-level system of health-care facilities, avoiding at the same time duplicatory planning." [14]

---

[11] Section 314(a)(2)(I) of the Public Health Service Act, as amended, *codified at* 42 U.S.C. § 246(a)(2)(I) (1976) (emphasis supplied).

[12] S. Rep. No. 724, 90th Cong., 1st Sess. 3 (1967) (emphasis supplied).

[13] H. Rep. No. 1297, 91st Cong., 2d Sess. 7 (1970).

[14] S. Rep. No. 657, 91st Cong., 2d Sess. 13 (1970). *See also* H. Rep. No. 91-262, 91st Cong., 1st Sess. 13 (1969).

B. The Creation Of The Joint Long-Range Hospital Planning Committee of Wake County

The "co-conspirator" Health Planning Council carried out its duties under the foregoing legislation by "promot-[ing] local organized comprehensive health planning" in the region it served. (App. V 2155-56.) The Council intended "through proper planning to maintain or limit the expansion—the rise of costs that was taking place at that time. . . ." (App. V 2161.) The Council therefore "dedicated itself towards orderly planning for the health needs of the citizens of its territoy including Wake County." (App. VIII 3351.)

Pursuant to these objectives (App. V 1976, 1978, 2026-29, 2158-59), and for the purpose of holding "down the cost of medical care in Wake County" (App. V 1978), the Health Planning Council participated in the creation of an alleged "co-conspirator," the Joint Long-Range Hospital Planning Committee of Wake County ("Planning Committee"), which was formed in 1969. The Planning Committee was an *ad hoc* group of 26 members of the public (App. VII 2880-81, 2885-87), of which two *ex officio* non-voting members were from Rex Hospital and two were from Wake Memorial Hospital. (App. V 2002-06.) Plaintiff was also invited to participate (App. V 1950-51, 2012; App. VI 2550-51) but after some initial involvement, plaintiff dropped out because it was "not planning" on expansion. (App. V 1951-52.)

After a series of 36 public meetings, the Planning Committee issued a Report in March 1971 recommending the expansion of Wake Memorial and the construction of a new hospital by Rex Hospital. The Report also contemplated that plaintiff's hospital, Mary Elizabeth Hospital, would expand from 40 to 60 beds. The Report endorsed "comprehensive health planning," recommending that "[t]here should be a continuing planning effort on a county-wide and area-wide basis for hospitals and health care." (App. VII 2883.) Upon issuance of the Report, the

Planning Committee disbanded. (App. II 582; App. V 2023, 2235-37.) It is this Report that plaintiff identifies as constituting the so-called "market allocation" conspiracy.

C. Plaintiff's Application For A Certificate Of Need

On July 21, 1971, the North Carolina legislature enacted a Certificate of Need law ("CON law") which declared as the "public policy of the State" that development of health and medical care facilities "shall be accomplished in a manner which is orderly, timely, economical, and without unnecessary duplication of these facilities." 1971 N.C. Sess. Laws ch. 1164, § 90-289. The CON law required that any proposed medical facility make an application for a certificate of need and that the MCC, as the licensing agency, make "a determination of need" with respect to such new facility. (§ 90-291(a).)

The CON law relied on the planning structure previously created by the foregoing federal health planning legislation. Thus, the CON law required the MCC to forward any application for a certificate of need "to the appropriate approved areawide health planning council for review." (§ 90-291(d).) Section 90-291(c) of the CON law required both the MCC and the areawide health planning council to consider an application for a certificate of need in light of "the number of existing and *planned* facilities" as well as "the availability of facilities or services which may serve as alternatives or substitutes." (Emphasis supplied.) The CON law also prohibited any disposition of an application that was contrary to the recommendations of the areawide planning council "unless such council has been notified by [the MCC] of the reason for its determination and has been granted full opportunity for hearing thereon by the board reviewing such a council's findings." (§ 90-291(c).)

On November 1, 1971 plaintiff filed an application for a certificate of need to replace the existing Mary Eliza-

beth Hospital with a new 140-bed general proprietary hospital in Raleigh. (App. VII 3029-51.) On November 4, 1971, in accordance with the CON law, the MCC forwarded the application to "co-conspirator", Health Planning Council, requesting recommendations. (App. IX 3678.) The MCC also requested the comments of other health providers, including Rex Hospital. (App. VII 2658.) Rex Hospital expressed views before the Council in opposition to the application, contending that the proposal was inconsistent with the recommendations of the Planning Committee for a "planned and orderly" development of facilities in Raleigh. (App. VII 2911.)

After receiving all comments, the Council recommended against the application, stating that the unplanned new Mary Elizabeth would duplicate other medical and surgical facilities (App. II 553-55; App. V 2163-66), and did not satisfy the requirement of Section 90-291(c) that the facility "contribute to the orderly development of adequate and effective health services." (App. V 2168.) The Council accordingly recommended to the MCC that plaintiff's application be denied. (App. VII 2978.)

After a hearing, on May 5, 1972, the MCC granted a certificate of need to plaintiff. (App. VII 2745.) In accordance with Section 90-291(c) of the CON law, the MCC advised the Council that it was entitled to a further hearing on the application. (App. VIII 2745.) Dissatisfied with the result, the Council exercised its rights and requested a hearing. (App. VIII 3335.) Rex Hospital also requested a hearing to present new evidence. On June 30, 1972, after a second hearing, the MCC affirmed its May 5, 1972, decision. (App. VII 2789.)

On July 28, 1972, acting pursuant to Section 90-291(h) of the CON law which permitted appeals to the state courts on "[d]ecisions concerning a certificate of need law," the Council appealed the MCC decision to the Wake County Superior Court. (App. II 824.) This appeal was

taken on the recommendation of its legal counsel. (App. VII 2796-97.) On February 9, 1973, the appeal was voluntarily dismissed as moot after the January 26, 1973, decision of the North Carolina Supreme Court in *In re Certificate of Need for Aston Park Hospital, Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973), which struck down the 1971 North Carolina CON law under the State Constitution.[15] This dismissal marked the cessation of all acts of defendants or the Health Planning Council in opposition to plaintiff's plans to build a new hospital.

D. The Alleged Blue Cross Discriminatory Reimbursement Policy

Plaintiff argues that the alleged conspiracy included, as a so-called "secondary plan," the use of a post-opposition discriminatory Blue Cross reimbursement policy. (Pet. at 8 n.13.) This contention is utter nonsense. The Blue Cross policy (1) was not, in fact, discriminatory; (2) was not adopted pursuant to any conspiracy; and (3) in any event, did not result in any delay to plaintiff.[16] Further, defendants do not contend that this alleged policy of Blue Cross falls within the *Silver* immunity rule.

The undisputed facts of record, ignored by plaintiff, overwhelmingly support these contentions. The Blue Cross reimbursement formula was not "discriminatory"; it was also "applied to non-profit hospitals." (App. IV 1382-83.) Blue Cross applied the same formula to deny approval of rate increases to both "[p]roprietary and non-proprietary" hospitals. (App. IV 1406-07.) Plaintiff's request for Blue Cross rate approval was denied only because its charges were "excessive" (App. IV 1375) and "unreasonable."

---

[15] North Carolina reenacted a certificate of need law in 1978. N.C. Gen. Stat. §§ 131-175 *et seq.* (1981).

[16] At the new trial ordered by the Fourth Circuit, plaintiff will be required to prove its case on all three of these issues.

(App. IV 1404.)[17] The reimbursement formula was completely uninfluenced by defendants, or any alleged coconspirator, and was not adopted pursuant to any "plan" between Blue Cross and defendants. (App. V 1939-41, 2021-22; App. VI 2275.)[18]

Similarly, there is a complete lack of evidence that the Blue Cross policy in any way delayed plaintiff in building its hospital. Plaintiff's own witnesses repeatedly testified that the post-opposition delay was caused by enactment of Section 1122 of the Social Security Amendments of 1972, 86 Stat. 1329 (1972) (App. V 1875), and thereafter, by the sudden rise of interest rates lasting to 1977, which made it difficult for plaintiff to obtain financing. (App. III 959, 985; App. IV 1481-84, 1534.) At trial, plaintiff's theory of the case completely excluded any possibility that the Blue Cross reimbursement policy caused any delay apart from or in addition to the delay allegedly caused by defendants' opposition to plaintiff's application for a certificate of need.[19]

II. THE FOURTH CIRCUIT'S DECISION

The Fourth Circuit reversed and remanded for a new trial on three independent grounds of which plaintiff identifies only one as a reason for granting certiorari. First, the Fourth Circuit held that defendants should be accorded an opportunity, denied to them by the trial court, to answer plaintiff's antitrust claims by showing on remand that their health planning activities, undertaken in 1969-1971, fell within the scope and purposes of then-

---

[17] After the January 1977 sale of plaintiff to Hospital Corporation of America, a proprietary hospital chain, Blue Cross promptly approved the next rate request submitted by plaintiff. (App. IV 1409-10.)

[18] *See Glen Eden Hospital, Inc. v. Blue Cross and Blue Shield*, 555 F. Supp. 337 (E.D. Mich. 1983).

[19] *See* note 29 and accompanying text, *infra*.

applicable federal health-care planning legislation. Recognizing that this approach involved an implied immunity, the Fourth Circuit relied on the principles outlined in *Silver v. New York Stock Exchange*, 373 U.S. 340, 360-61 (1963) (a decision not even *cited* by plaintiff in its petition), where this Court held that "particular instances" of otherwise *per se* illegal conduct which "fall within the scope and purposes" of another federal statute "may be regarded as justified in answer to the assertion of an antitrust claim." The Fourth Circuit thereupon analyzed the "scope and purposes" of the pre-1974 health planning legislation, holding that this legislation contemplated planning activities by governmental and nongovernmental entities for the purpose of preventing "needless duplication" of health care facilities and services. The court concluded that defendants were entitled to an opportunity to prove, as an affirmative defense, that their conduct was, in fact, merely a good faith attempt to undertake the planning funded and encouraged by Congress in the pre-1974 legislation. (Pet. App. A at 7a-13a.)[20]

The Fourth Circuit also relied on footnote 18 of this Court's opinion in *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U.S. 378, 393 n.18 (1981), where the Court adopted the *amicus* position of the United States, holding that the reconciliation mandated by *Silver* necessarily meant that some types of conduct falling within the scope and purposes of federal health-care planning legislation are impliedly immune from prosecution under the antitrust laws. The Fourth Circuit simply applied the legal principles settled in *Silver* and affirmed in *National Gerimedical* to conduct taking place under pre-1974 federal health-care planning legislation and gave defendants a chance to introduce evidence under this test. This holding is the only ground upon which plaintiff seeks review.

---

[20] Citations to the Fourth Circuit's opinion are to Appendix A attached to plaintiff's Petition for Certiorari.

Second, in a series of rulings from which plaintiff does not seek review, the Fourth Circuit found erroneous several of the trial court's *Noerr-Pennington*[21] jury instructions. For example, at trial and before the Fourth Circuit, plaintiff contended that defendants' opposition to its certificate of need application fell with the sham exception to the *Noerr-Pennington* doctrine because the opposition was pursuant to a "larger scheme," *i.e.*, defendants' health planning activities. The trial court accepted this "larger scheme" sham theory, instructing the jury that "[i]f the courts are used or litigation is filed as part of an overall scheme to attempt to monopolize or exclude competition from the marketplace or otherwise violate the antitrust laws, that conduct does not enjoy antitrust immunity." (Pet. App. A at 15a.) The Fourth Circuit correctly held that "[t]his charge is erroneous." (*Id.*)[22]

Third, the Fourth Circuit held that the trial court's jury instructions had improperly permitted the jury to find that the North Carolina Assistant Attorney General, Christine Denson, became a co-conspirator by virtue of her assistance to the Health Planning Council during one of the hearings on plaintiff's application. As urged by the State of North Carolina, appearing as *amicus curiae* be-

---

[21] *Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

[22] Plaintiff does not seek review of the Fourth Circuit's rejection of the "larger scheme" instruction. Plaintiff does attempt to "reserve the right to argue" (Pet. at ii) the merits of the Fourth Circuit's separate refusal to accept the trial court's additional jury instruction that "conduct in abuse of the adjudicatory or judicial process which is part of a larger conspiracy to restrain trade or to monopolize a market is not immune from the antitrust laws." (Pet. App. A at 15a.) Since plaintiff does not seek certiorari on this holding, it may not "reserve" the right to argue its correctness. Rule 21.1(a) of this Court's Rules states "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." The reference to "questions" in Rule 21 necessarily means only those "questions" on which certiorari is sought.

low, the court held that "[w]e do not believe that HBC has offered sufficient evidence that [the Assistant Attorney General] was not merely fulfilling her duties as an assistant attorney general and was instead knowingly contributing to the illegal conspiracy by assisting the Central Planning Council in its attempts to prevail before the MCC." (Pet. App. A at 17a.)[23]

Plaintiff's Petition seeks certiorari only on the implied immunity question. Thus, even if this Court were to grant certiorari and reverse the Fourth Circuit's implied immunity ruling, the Court nonetheless would be compelled to affirm the Fourth Circuit's reversal and remand on the basis of the Fourth Circuit's other rulings. The new trial required by these other rulings[24] only serves to

---

[23] While plaintiff does not seek certiorari on this issue, plaintiff attempts to "reserve" the issue, implying that the Fourth Circuit required more than a preponderance of the evidence in order to show membership in the conspiracy. (Pet. at ii.) As with plaintiff's attempt to "reserve" the *Noerr-Pennington* question, plaintiff may not "reserve" the right to argue an issue on which certiorari is not sought. The Fourth Circuit certainly did not require more than a preponderance of the evidence; it merely found that plaintiff had failed to introduce sufficient evidence for the issue to go to the jury under that standard. This Court does not sit to review such factual determinations.

[24] Plaintiff argues that the Fourth Circuit "did not rule that the trial court committed reversible error" on these additional issues. (Pet. at 12 n.17.) This contention is nonsense. It is axiomatic that "in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless." *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919). *See also United States v. River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 10, 11 (1970). The trial court's jury instructions were hardly "harmless error." In *Pennington*, for example, this Court held that "larger scheme" instructions were not harmless error because of the "obviously telling nature" of such evidence. (381 U.S. at 670.)

emphasize the interlocutory nature of the Fourth Circuit's implied immunity ruling.[25]

SUMMARY OF ARGUMENT

1. The writ should be denied as premature. The Fourth Circuit remanded this case for new trial on both implied immunity and *Noerr-Pennington* issues. A new trial is also necessitated by the Fourth Circuit's rejection of the co-conspirator status of the North Carolina Attorney General. The Court should adhere to its usual practice of denying interlocutory review so as to permit the development of the full factual record ordered by the Fourth Circuit.

2. In reconciling the antitrust laws with the pre-1974 federal health planning legislation, the Fourth Circuit merely applied *Silver* and *National Gerimedical* to conduct occurring under legislation which has since been replaced by the 1974 Planning Act. The case thus represents the application of well-settled legal principles in a judgment concerning out-of-date federal legislation. Certiorari is inappropriate in such unique circumstances.

---

[25] The Fourth Circuit rejected two other grounds for reversal urged by defendants. First, the court affirmed the trial court's refusal to give a separate interrogatory to the jury on the issue of plaintiff's preparedness. Second, the court held that under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), defendants could be found liable for the post-opposition delay caused by the enactment of other federal legislation and the rise in interest rates. These issues are addressed in defendants' conditional cross-petition for certiorari. *Trustees of Rex Hospital, et al. v. Hospital Building Company*, Dkt. No. 82-1762 (filed April 28, 1983).

REASONS FOR DENYING CERTIORARI

I. THE FOURTH CIRCUIT'S DECISION IS AN INTERLOCUTORY JUDGMENT CONCERNING OUT-OF-DATE LEGISLATION ON A NON-DISPOSITIVE ISSUE

A. Certiorari Should Be Denied Because Of The Interlocutory Nature Of The Judgment Below

Throughout its Petition, plaintiff argues as if the Fourth Circuit had actually held that defendants' conduct was immune from the antitrust laws. On the contrary, the Fourth Circuit merely formulated an affirmative defense of limited implied immunity based on *Silver* and *National Gerimedical* and held that "defendants are entitled in further proceedings to have [the affirmative defense] applied *to the extent the evidence on retrial may justify.*" (Pet. App. A at 12a-13a; emphasis supplied.) At this stage of the case, the record simply does not contain sufficient evidence as to whether defendants have met their implied immunity defense. Certiorari should be accordingly denied so as to permit further development of the facts.

Denial of certiorari is plainly indicated by the long-standing principle that this Court "should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, Tampa & Key West Railway*, 148 U.S. 372, 384 (1893). This Court has consistently adhered to this practice in later decisions. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

Denial of plaintiff's Petition will not preclude later review of this case. In *Hamilton-Brown Shoe Co. v. Wolf*

Brothers & Co., 240 U.S. 251 (1916), for example, the Court rejected the argument that denial of certiorari from an interlocutory judgment precluded review of the questions decided by the interlocutory decision when the case was ultimately accepted after a second, final decision. The Court explained that "except in extraordinary cases, the writ is not issued until final decree" and the non-final nature of a decree is "a fact that of itself alone furnished sufficient ground for the denial of the application . . . ." (240 U.S. at 258.)

These principles strongly favor denial of the writ. As plaintiff's counsel, Eugene Gressman, has written, "[t]he Supreme Court will not usually grant certiorari to review a nonfinal judgment, such as one remanding the case to the district court for a new trial. . . ." R. Stern, E. Gressman, *Supreme Court Practice* ¶ 4.19 at 300 (5th ed. 1978). Plaintiff has not presented any compelling or "extraordinary" reason for this Court to deviate from its usual practice of denying interlocutory review. The Court should adhere to *Hamilton-Brown* and refuse to accept review of the interlocutory judgment below.

B. The Fourth Circuit's Implied Immunity Ruling Concerns Conduct Under Federal Legislation Since Replaced By The 1974 Planning Act

As *Hamilton-Brown* explained, an issue must be truly "extraordinary" for the Court to accept interlocutory review. The implied immunity issue decided by the Fourth Circuit is not such an issue because it concerns health planning conduct taking place in 1969-1971 under a federal statutory scheme that was almost entirely replaced by the 1974 Planning Act.[26] Indeed, plaintiff takes the position that the 1974 Planning Act "has no relevance to the merits of this action." (Pet. at 14 n.19.)[27]

---

[26] *See* Section 5(c) of the Act, 88 Stat. at 2275 (1974).

[27] Plaintiff speculates that cases involving the 1974 Planning Act "will be considered under the Fourth Circuit's test if that decision

It is well established that certiorari is inappropriate in such circumstances. In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955), for example, this Court dismissed certiorari as improvidently granted upon discovering that a state statute enacted subsequent to the commencement of the litigation prevented the ultimate question presented in the case from recurring, stating:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants . . . . "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. (349 U.S. at 74.)

See also District of Columbia v. Sweeney, 310 U.S. 631 (1940) ("Petition for writ of certiorari . . . denied in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance").

C. A Retrial In This Case Would Be Necessary Regardless Of The Fourth Circuit's Implied Immunity Ruling

The Fourth Circuit's implied immunity ruling is only one of several grounds necessitating a retrial in this case. Review of the implied immunity decision would not shorten the case or preclude a retrial and is thus not "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction*, 148 U.S. at 384. Indeed, while retrial of this matter will encompass fact issues relevant to the implied immunity question, the case may well ultimately turn on the

---

is allowed to stand." (Pet. at 24 n.29.) The short answer to this assertion is that the Court should consider reviewing such a case when and if it arises.

Noerr-Pennington issues or the absence of the Assistant State Attorney General as an alleged co-conspirator. *See, e.g., Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 10, 11 (1970).

The special interrogatories submitted to the jury made clear that plaintiff's entire theory of liability and damages turned on the legality of defendants' petitioning efforts before the MCC and the Superior Court of Wake County—not on the legality of defendants' planning efforts. Interrogatory 6 asked the jury to determine whether defendants' opposition before the MCC and the appeal by the Health Planning Council to the Superior Court violated the antitrust laws. (App. I 293.) The trial court then instructed:

> If your reply to Question 6 is "No," *do not answer* Question 7. If your reply to Question 6 is "Yes," proceed to answer Question 7. (*Id.*; emphasis supplied.)

Question 7 asked the jury to determine "what amount . . . the business of Hospital Building Company was damaged." (*Id.*)[28] Plainly, plaintiff is not entitled to any relief if defendants' opposition before the MCC and the Superior Court did not violate the antitrust laws under the *Noerr-Pennington* doctrine.[29]

It is undisputed that the *Noerr-Pennington* doctrine immunizes defendants' opposition unless plaintiff can satisfy the "sham exception" to the doctrine. In recognition of

---

[28] The Special Verdict form is attached as an appendix to defendants' cross-petition for certiorari. *Trustees of Rex Hospital et al. v. Hospital Building Co.*, Dkt. No. 82-1762 (filed April 28, 1983). Plaintiff stated at trial that it had "[n]o objection" to this Special Verdict form. (Tr. 5254.)

[29] Interrogatory 6 also makes clear that plaintiff's theory of liability and damages completely excluded the alleged post-opposition Blue Cross reimbursement policy, the so-called "secondary plan." In short, plaintiff's "secondary plan" argument is irrelevant under plaintiff's own theory of the case.

this reality, plaintiff tried the case—and the trial court instructed the jury—on the theory that the planning activities of defendants constituted a "larger scheme," the presence of which supposedly converted the opposition into a "sham." It was, however, this "larger scheme" theory which the Fourth Circuit found to be "erroneous." (Pet. App. A. at 15a.) Plaintiff does not seek review of this holding. Certiorari is thus premature because a retrial on the *Noerr-Pennington* issues may be dispositive.

II. THE FOURTH CIRCUIT'S IMPLIED IMMUNITY RULING IS SIMPLY AN APPLICATION OF *SILVER* AND *NATIONAL GERIMEDICAL* TO THE PARTICULAR FACTS OF THIS CASE

A. The Fourth Circuit Properly Applied *Silver* And *National Gerimedical*

The Fourth Circuit's implied immunity analysis is hardly novel as plaintiff contends. Rather, the Fourth Circuit merely applied to the facts of this case the implied immunity principles set forth in *Silver* and expressly applied to "the health-care industry" by a unanimous Court in *National Gerimedical*. This case thus does not present any important or unsettled questions of federal law warranting review by this Court.

In *Silver*, a decision expressly relied on by the Fourth Circuit and yet not even cited by plaintiff in its Petition, the issue presented was whether a group boycott conducted by the New York Stock Exchange under the Securities and Exchange Act was *per se* illegal. The Court agreed that "absent any justification derived from the policy of another statute or otherwise, the Exchange acted in violation of the Sherman Act" (373 U.S. at 348-49), but held that the proper approach was "to *reconcile* pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of *a public policy*

contemplating that securities exchanges will engage in self-regulation which may well have anticompetitive effects in general and in specific applications." (373 U.S. at 349; emphasis supplied.) The Court reasoned that such an approach required the use of the "rule of reason," stating that "*under the aegis of the rule of reason*, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act." (373 U.S. at 360; emphasis supplied.)

Explaining that this approach did not involve a blanket repeal, the Court in *Silver* focused on the possibility of specific conflicts, reasoning that while "the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws . . . it is also true that *particular instances* of exchange self-regulation *which fall within the scope and purposes* of the Securities Exchange Act *may be regarded as justified in answer to the assertion of an antitrust claim.*" (373 U.S. at 360-61; emphasis supplied.) The Court then reviewed the statute and concluded that the discontinuance of the wire service at issue there was not "so justified" because defendants had denied plaintiffs a hearing on the reasons for the discontinuance. Such a denial, the Court ruled, served no policy "reflected" in the Securities Act. (373 U.S. at 361.)

The analysis of *Silver* was expressly applied to "the health-care industry" in *National Gerimedical*. (452 U.S. at 392.) There, the issue was whether there was a blanket exemption for a Blue Cross policy pursuant to which Blue Cross refused to deal with hospitals unless the hospitals' capital expenditures had undergone planning review by the local Health Systems Agency established under the 1974 Planning Act. The Court held that the Act did not "create a 'pervasive' repeal of the antitrust laws as applied to every action taken in response to the health-care planning process." (452 U.S. at 393.) The Court also held that "there was no specific conflict be-

tween the [1974 Planning] Act and the antitrust laws in this case" (452 U.S. at 393), reasoning that "there is no reason to believe that Congress specifically contemplated" such actions by Blue Cross. (452 U.S. at 391.)[30]

In so holding, however, this Court took pains to "emphasize that our holding does not foreclose future claims of antitrust immunity in other factual contexts." (452 U.S. at 393 n.18.) Adopting the *amicus* position of the United States and relying on *Silver*, the Court observed that an implied antitrust immunity may be appropriate under the 1974 Planning Act in cases of specific conflict, where, for example, a local Health Systems Agency (the successor to Health Planning Councils under the 1974 Act) "has expressly advocated a form of cost-saving cooperation among providers. . . ." (*Id.*)[31] The Blue Cross policy there involved did not pose such a specific conflict, the Court ruled, because "the conduct at issue is not cooperation among providers, but an insurer's refusal to deal with a provider that failed to heed the advice of an HSA." (*Id.*)

In this case, the Fourth Circuit merely reconciled the antitrust laws with the pre-1974 federal health-care planning legislation. As *Silver* and *National Gerimedical* held, " 'the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted.' " *National Gerimedical*, 452 U.S. at 392, *quoting Silver*, 373 U.S. at

---

[30] The Court also noted that application of the antitrust laws to Blue Cross' conduct would not "frustrate a particular provision" of the 1974 Planning Act. (452 U.S. at 390.)

[31] The Court further quoted the position of the United States which argued that "there are some activities that *must*, by implication, be immune from antitrust attack" (452 U.S. at 393 n.18; emphasis supplied). The Court also quoted from legislative history, noting that the " 'intent of Congress was that HSAs and providers who voluntarily work with them in carrying out the HSA's statutory mandate should not be subject to the antitrust laws.' " (*Id.*)

357. The Fourth Circuit thus reasoned that the necessary first inquiry was into what Congress "contemplated" in enacting the pre-1974 legislation. *Silver*, 373 U.S. at 358; *National Gerimedical*, 452 U.S. at 391.[32] While plaintiff berates the Fourth Circuit for relying on what Congress "envisioned" in enacting this planning legislation (Pet. at 13), there is hardly a difference of legal significance between what Congress "contemplates" and what Congress "envisions." As the Fourth Circuit recognized, in each case the test is whether the challenged conduct falls within the "scope and purposes" of other federal legislation. *Silver*, 373 U.S. at 361. *See also McDonnell v. Michigan Chapter # 10*, 587 F.2d 7, 9 (6th Cir. 1978).

Adopting "a fairly narrow intepretation" of the pre-1974 legislation, the Fourth Circuit found that "the statutory authorization relied upon here . . . runs only to good faith participation in planning activities aimed at avoiding the needless duplication of health care resources in an affected area." (Pet. App. A at 11a.) This construction of the pre-1974 legislation is overwhelmingly supported by the language and legislative history of the statutes cited by the court of appeals below. (Pet. App. A at 10a-11a.)

The Fourth Circuit's reliance on the good faith of defendants is consistent with both *Silver* and *National Gerimedical*. In *Silver*, the Court declined "to pass upon the sufficiency of the reasons which the Exchange later assigned for its action," holding that the Exchange had "plainly exceeded the scope of its authority under the Securities Exchange Act." (373 U.S. at 365.) The Court

---

[32] In *Silver*, the Court stated that "[t]he issue is only that of the extent to which the character and objectives of the duty of exchange self-regulation *contemplated* by the Securities and Exchange Act are incompatible with the maintenance of an antitrust action." (373 U.S. at 358; emphasis supplied.) Similarly, in *National Gerimedical*, there was no conflict because Congress had not "contemplated" conduct such as that engaged in by Blue Cross. (452 U.S. at 391.)

concluded, therefore, that there was no need to decide whether the justification was "to be governed by a standard of arbitrariness, *good faith*, reasonableness, or some other measure." (373 U.S. at 366; emphasis supplied.)

In this case, the Fourth Circuit merely held that good faith was the appropriate standard under the pre-1974 health planning legislation. The court took pains to note that this standard was to be applied by reference "to the health care needs of the consumer public in the market area at the time in question, objectively assessed, and not in relation to the economic or other needs of the 'planners,' either objectively or subjectively assessed." (Pet. App. A at 12a.) This standard is the bare minimum necessary. Unless providers are assured that good faith participation in planning is protected, they will not become involved in health planning and the purposes of federal planning legislation will be thwarted. As the Fourth Circuit found, such "participation by private health care providers is clearly anticipated and we think desirable." (Pet. App A at 9a-10a.) Such participation is identical in principle to the good faith "cost-saving cooperation among providers" which this Court suggested would be immune in footnote 18 of *National Gerimedical*.[33]

Plaintiff, acknowledging as it must that *National Gerimedical* supports an implied immunity, argues that "[n]one of the 'planning' activities of respondents were organized under or conducted pursuant to any of the statutes cited by the Fourth Circuit." (Pet. at 15.) This *ipse dixit* is simply wrong on the facts. More importantly, as the Fourth Circuit recognized, defendants were precluded from introducing evidence under this test by the trial court's *per se* ruling. The remand ordered by the

[33] Such participation in local health planning was of the type "contemplated" (452 U.S. at 391) by Congress in the pre-1974 legislation such that application of the antitrust laws to this conduct would "frustrate" (452 U.S. at 390) the provisions of the pre-1974 legislation cited by the court below.

Fourth Circuit simply gives defendants a chance to demonstrate that their planning activities were pursuant to the pre-1974 planning legislation. Essentially, plaintiff would have this Court deny defendants an opportunity to make a record on grounds that the present record is deficient. This "bootstrapping" only serves to highlight the need for the remand ordered by the court below.

B. The Fourth Circuit's Implied Immunity Ruling Is Consistent With The Other Rulings Of This Court

Focusing solely on the Fourth Circuit's use of the term "rule of reason," plaintiff argues that the court created a "hybrid" test never previously sanctioned by this Court. (Pet. at 17.) This disingenious argument elevates form over substance. In using the term "rule of reason," the Fourth Circuit merely adopted the usage of the term in *Silver*, where this Court stated that "under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act." (373 U.S. at 360.) The Fourth Circuit expressly recognized, as did this Court in *National Gerimedical*, that this "rule of reason" is simply an implied immunity applicable in "particular instances" of direct conflict between the antitrust laws and other federal statutes. (Pet. App. A at 9a.) There is nothing unique or "hybrid" about this implied immunity; it is a correct application of the legal principles established in *Silver* and *National Gerimedical*.

Plaintiff also argues that the implied immunity test is in conflict with *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), and *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). This contention is plainly fallacious. In *Professional Engineers* and *Maricopa*, there was no need to reconcile federal statutory schemes because in neither case was it contended that the challenged conduct was "contemplated" by other federal legislation. The implied

immunity test adopted by the Fourth Circuit is apposite only in instances of a specific conflict between the antitrust laws and another federal statute. This is precisely the teaching of *Silver* and *National Gerimedical*. The Fourth Circuit hardly violated the "separation of powers doctrine," as argued by plaintiff (Pet. at 20-21), in applying *Silver* and *National Gerimedical*.

Finally, the Fourth Circuit's application of the implied immunity test to plaintiff's Section 2 claims was completely proper. Plainly, an implied immunity arising from a need to reconcile federal legislation cannot be limited to claims arising only under Section 1 of the Sherman Act. Indeed, in *National Gerimedical*, the complaint alleged violations of both Section 1 and Section 2 of the Sherman Act. (452 U.S. at 382.)

CONCLUSION

For all the foregoing reasons, plaintiff's Petition for Certiorari should be denied.

Respectfully submitted,

RAY S. BOLZE
(Counsel of Record)
MARK W. PENNAK
RONALD K. PERKOWSKI
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

THOMAS W. STEED, JR.
NOAH H. HUFFSTETLER, III
DEAN M. HARRIS
MOORE, VAN ALLEN & ALLEN
Post Office Box 2058
Raleigh, North Carolina 27602
(919) 828-4481

Counsel for Defendants-Respondents Trustees of Rex Hospital, et al.

Dated: May 6, 1983